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Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal

Eugene Kontorovich*

Abstract

United Nations Security Council Resolution 242, passed in the wake of the Six-Day War in 1967, is one of the body's most famous decisions. The resolution called for "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict." The meaning of this provision—in particular, the extent of the required withdrawal—has been contested ever since. This Article presents new evidence on Resolution 242's meaning, adding two important but previously unexamined lines of evidence that bear on its interpretation. It compares the resolution's withdrawal provision to all other such territorial demands issued by the Security Council. The marked difference that emerges between Resolution 242's wording and that of all other such resolutions suggests the former was a meaningful and substantive drafting choice. The Article then sheds further light on the preamble's reference to the "inadmissibility" of conquest by examining original understandings of the U.N. Charter. International jurists of the post-World War II era believed the Charter prohibited territorial changes as a result of war but only with significant limitations and exceptions. The new evidence presented here supports the view that Resolution 242 contemplates only a partial Israeli withdrawal. This understanding is particularly relevant to current suggestions to "update" Resolution 242 by a new Security Council resolution.

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I. INTRODUCTION

United Nations Security Council Resolution 242,¹ passed in November 1967 in the wake of the Six-Day War, is widely regarded as among the most important of all the Council's measures.² It remains the foundation of the U.N.'s approach to the Arab-Israeli conflict.³ The resolution famously calls for the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict." The meaning of this provision has been contested ever since.⁴

One interpretation holds that Resolution 242 requires a complete Israeli withdrawal from all the territories that came under its control during the Six-Day War. This is consistent with, but not mandated by, a straightforward reading of the language and the French text.⁵ Proponents of the broad interpretation of the resolution also point to the preamble's reference to the "inadmissibility of the acquisition of territory in war" as corroborating their position.⁶

Yet the drafting history of the provision tells a different story. The British and U.S. diplomats involved in framing the resolution specifically omitted a "the" before "territories" to leave the extent of the required withdrawal open for future negotiations between Israel and its neighbors.⁷ Indeed, over several months of deliberations in the Council, the U.K. and U.S. rejected attempts by

¹ S.C. Res. 242, U.N. SCOR, 22d Year, U.N. Doc. S/INF/22/Rev.2, at 8–9 (Nov. 22, 1967).

² See Bruce D. Jones, *The Security Council and the Arab-Israeli Wars: 'Responsibility without Power'*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945* 298, 308–09 (Vaughan Lowe et al. eds., 2008).

³ See, for example, S.C. Res. 338, U.N. SCOR, 28th Year, U.N. Doc. S/INF/29, at 10 (Oct. 22, 1973); S.C. Res. 1397, U.N. SCOR, U.N. Doc. S/INF/57, at 220 (Mar. 12, 2002); see also U.N. G.A. Res. 68/262 (Mar. 29, 2012) (citing Resolution 242 as a "basis" for a Middle East peace settlement).

⁴ See JOHN QUIGLEY, *THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE* 170 (2005) (noting that the removal of the word "the" from Resolution 242 makes it "unclear whether withdrawal was to be from all the territories . . . or only from some portion").

⁵ The French text refers to "*des territoires*." "*Des*" itself is neither a definite nor indefinite article, but can sometimes be used as the former. See SHABTAI ROSENNE, *On Multilingual Interpretation*, in *ESSAYS ON INTERNATIONAL LAW AND PRACTICE* 449, 451–52 (2007) (arguing that, because negotiations and the original U.K. draft were in English, that language should be seen as controlling); see also Jones, *supra* note 2, at 308. But see Toribio de Valdés, Comment, *The Authoritativeness of the English and French Texts of Security Council Resolution 242 (1967) on the Situation in the Middle East*, 71 AM. J. INT'L L. 311, 316 (1977) (arguing that the French and English conflict and, because they are both official languages, "are of equal weight").

⁶ See *infra* Section IV.

⁷ See ARTHUR LALL, *THE U.N. AND THE MIDDLE EAST CRISIS, 1967* 253–54 (1968); see also Jones, *supra* note 2, at 308–09; DENNIS ROSS, *THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE* 807 n.26 (2004); Vernon Turner, Special Advisor, Can. Foreign Ministry Task Force on Cent. & E. Eur., *The Intent of UNSC 242—The View of Non-Regional Actors*, Presentation at the Washington Institute Harris Symposium (1992), in U.N. SECURITY COUNCIL RESOLUTION 242: THE BUILDING BLOCK OF PEACEMAKING 21, 27 (1993).

the Arab-aligned nations to explicitly require withdrawal from “all” or “the” territories.⁸ The Western states insisted that it would be both unreasonable and unrealistic to require a complete Israeli withdrawal to the 1949 Armistice Lines, which would also entail a complete Israeli abandonment of Jerusalem’s holy sites.

The stakes of the “the” debate are high. Resolution 242 is variously cited as both supporting and negating Israeli territorial claims to the Golan Heights and the West Bank.⁹ Others see it as establishing the general principle that future borders will be based on negotiations, not dogmatic adherence to the 1949 Armistice Lines.¹⁰ According to one reading, Israel has been flouting a Security Council Resolution for nearly five decades. According to the other, Israel has already complied—by relinquishing well over 90% of territory it occupied (the entire Sinai Peninsula, all of Gaza, parts of the West Bank, and small parts of the Golan).¹¹ And so the debate has gone back and forth, with much heat but little new light in the past four decades.

Moreover, as of this writing, significant efforts by the European Union, and potentially the U.S., are aimed at passing a new Security Council resolution “updating” Resolution 242.¹² Whether such a resolution merely restates the territorial conclusions of its predecessor or aggressively takes away Israeli entitlements under the compromise of 1967—giving what the U.N. conceded to

⁸ See Eugene V. Rostow, *The Drafting of Security Council Resolution 242: The Role of the Non-Regional Actors*, 25 N.Y.U. J. INT’L L. & POL. 489, 499–502 (1993) (describing contemporaneous statements by U.S. officials involved in the negotiations that a complete withdrawal was explicitly rejected).

⁹ Compare Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT’L L. 415, 435 n. 55 (1969) (arguing that Israel retains territories secured in 1967 “in violation” of 242), and Quincy Wright, *The Middle East Problem*, 64 AM. J. INT’L L. 270, 369 (1970), with Yehuda Blum, *The Territorial Clauses of Security Council Resolution 242*, JERUSALEM CTR. FOR PUB. AFF. (June 4, 2007), available at <http://www.jcpa.org/text/resolution242-blum.pdf> (arguing that drafting history and other provisions of 242 show it does not require full Israeli withdrawal), and Rostow, *supra* note 8 (arguing that the drafting history of 242 makes clear that it does not require a complete withdrawal). For a survey of authorities, see Victor Kattan, *The Legality of the West Bank Wall: Israel’s High Court of Justice v. the International Court of Justice*, 40 VAND. J. TRANSNAT’L L. 1425, 1461 n.190 (2007) (rejecting the “right-wing” view that complete withdrawal is not required).

¹⁰ See, for example, S.C. Res. 1397, *supra* note 3 (referring to Resolution 242 in the preamble); Letter from George W. Bush, President, United States, to Ariel Sharon, Prime Minister, Israel (April 14, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040414-3.html> (“As part of a final peace settlement, Israel must have secure and recognized borders, which should emerge from negotiations between the parties in accordance with UNSC Resolutions 242 and 338.”); ROSS, *supra* note 7, at 70–71, 80.

¹¹ See MARTIN GILBERT, *THE ROUTLEDGE ATLAS OF THE ARAB-ISRAELI CONFLICT* 70, 74, 115, 151, 170 (10th ed. 2012).

¹² See Herb Keinon, *After Israeli elections, Palestine issue to once again take center stage*, JERUSALEM POST, Feb. 21, 2015, available at <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Where-the-twain-may-meet-391616>.

Israel then to the Arabs today—depends on what was really decided in 1967. If Resolution 242 required a full withdrawal, then a “new peace architecture,”¹³ even one that would spell out Israel’s complete withdrawal from the West Bank in great detail, would not change the fundamental territorial parameters established by the Council in 1967. But if Resolution 242 allows a partial withdrawal, then the proposed new resolutions would contradict and countermand the earlier resolution, to Israel’s substantial disadvantage.

Even as the Council is poised to revisit the legacy of Resolution 242, important evidence that bears on how that resolution should be read has not been examined. This evidence—the wording of other territorial withdrawal demands passed in other situations by the Security Council—demonstrates the significance of the missing “the.” Looking at parallel language in other measures by the same body is a recognized tool of interpretation, yet one that has not been applied in relation to Resolution 242. Additionally, examining the post–World War II discussions in the U.N.’s International Law Commission, where the leading international jurists of the time discussed the principle against territorial acquisition and its limits, sheds new light on the resolution’s meaning. This understanding of the non-acquisition principle was confirmed by (and perhaps was necessary to reconcile the U.N. Charter with) contemporaneous state practice.

This Article does not aim at a comprehensive evaluation of Resolution 242. The arguments about its drafting history and multilingual texts have been heavily rehearsed.¹⁴ The central argument against the narrow Anglo-American interpretation is that a definite article before “territories” is unnecessary to connote a complete withdrawal. In this view, saying “withdrawal from territories” is a natural formulation for connoting a complete withdrawal.¹⁵ In short, if a “the” would be superfluous anyway, then its absence does not mean anything. That proposition is not merely a grammatical one—it is also one about convention and usage, and as such can be empirically tested.

Section II of this Article explains how parallel language in other U.N. Security Council resolutions can be used to shed light on the meaning of Resolution 242. Section III applies this approach by comprehensively surveying other resolutions calling for territorial withdrawal in other geopolitical situations.

¹³ Robert Serry, Special Coordinator for the Middle East Peace Process, Security Council Briefing (Mar. 26, 2015), <http://www.un.org/wcm/content/site/undpa/main/about/speeches/pid/25924>.

¹⁴ The debate over the meaning of the resolution and the effect of the missing “the” began almost immediately after the resolution’s passage and has continued to the present day. *See* Kattan, *supra* note 9, at 1461 & n.90; *see* sources cited *supra* notes 4–9.

¹⁵ *See generally* Kattan, *supra* note 9, at 1461 & n.90.

It finds that when they call for complete withdrawal, they use unambiguous language distinct from that found in Resolution 242. Indeed, Resolution 242's phraseology is unique. Section IV presents new context for understanding the perambulatory phrase about the "inadmissibility" of territorial acquisition. It shows that in light of the legal principles developed by the U.N.'s International Law Commission before 1967, this inadmissibility was not understood to be absolute. Moreover, the writings of eminent publicists and the drafting debates over the U.N.'s Friendly Relations Declaration of 1970 show that there was no agreement on the relevant particulars of the territorial acquisition norm in 1967. Instead, the norm as it stood in 1967 had well-known lacunae, potentially including non-sovereign territory and lawful uses of force. These sources, spanning the full array of contemporaneous *opino juris*, provide clear evidence that the "anti-acquisition norm," as it stood in 1967, had not progressed to fully cover Israel's gains that year.

The Article concludes that the case for the narrow reading of Resolution 242—as requiring only partial Israeli withdrawal from the territories that came under its control in 1967—is significantly stronger when considered against the background of broader Security Council and U.N. principles and practice.

II. PARALLEL LANGUAGE AS AN INTERPRETIVE TOOL

One technique for interpreting the meaning of language in a legal text, such as a statute or contract, is to compare it with similar expressions in parallel enactments. Checking for such "external" consistency of legal instruments is important to ensure coherence and fairness within a system: similar words used by the same body should have similar consequences and different ones different consequences, absent significant countervailing reasons. Such comparisons are also useful for assessing the importance of the different wording used in different measures. The use of a standard language to express something suggests that language has a fixed meaning. It also suggests that departures from the standard form are purposeful and significant. Such an inquiry has not previously been undertaken for the "canonical" Resolution 242. However, in discussing Resolution 242, commentators have made arguments based on an array of other interpretive methods and tools, including plain meaning,¹⁶ drafting history,¹⁷ other provisions of the instrument, and background principles of international law.¹⁸

¹⁶ Compare Kattan, *supra* note 9, with QUIGLEY, *supra* note 4.

¹⁷ See sources cited *supra* notes 7–8.

¹⁸ See, for example, Adnan Abu Odeh, Permanent Representative of Jordan to the U.N., *The Origins and Relevance of UNSC Resolution 242*, Presentation at the Washington Institute Harris Symposium (1992), in U.N. SECURITY COUNCIL RESOLUTION 242: THE BUILDING BLOCK OF PEACEMAKING

There has been relatively little study of the particular interpretive methodology for Security Council resolutions, as opposed to treaties and other legal instruments.¹⁹ Security Council resolutions are neither treaties, nor legislation, nor judicial decisions, though they have some features of each. As with any legal text, the actual language is central. Yet given the political nature of these resolutions and the often hasty circumstances in which they are drafted, the leading scholarly work on the subject recommends a liberal use of *travaux préparatoires* (legislative history) and other contextual methods.²⁰ Others have favored a more textualist “plain meaning” approach to interpreting resolutions.²¹ All agree on the general relevance of standard principles of treaty interpretation, enshrined in the 1969 Vienna Convention on the Law of Treaties,²² though the Convention’s treaty interpretation guidelines are not strictly applicable to Security Council resolutions. The few commentators to specifically address the interpretation of Security Council resolutions agree that the consistency of terms across resolutions and subsequent practice is understood to be a legitimate, if imperfect, interpretive tool.²³

There are two distinct ways in which the language of cognate withdrawal resolutions is relevant to interpreting Resolution 242. The first, cross-instrument consistency, takes as its premise that the drafters had available to them prior withdrawal provisions. When patterns and consistent practice can be found among these resolutions, it supports the view that a departure from such practice is purposeful. In this use of cognate resolutions, the focus must be on the pre-1967 ones. A different interpretive use of other resolutions is simply as a test of English meaning and grammar. The central argument behind the broad view of Resolution 242 is that “territories” is synonymous with “all the territories”—that is, if someone wanted to demand complete withdrawal, saying “withdrawal from territories” would be the natural way to do it.²⁴ As a

45, 48–49 (1993) (arguing that the “spirit” of the resolution—“that peace and territorial conquest are incompatible”—trumps any “linguistic ambiguities”).

¹⁹ See Michael Byers, *Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity*, 10 GLOBAL GOVERNANCE 165, 179–80 (2004).

²⁰ See Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73, 93–95 (1998).

²¹ See, for example, ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 488–89 (2008).

²² Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

²³ See Wood, *supra* note 20, at 82, 89, 95; ASIA PACIFIC CENTRE FOR MILITARY LAW, *INTERPRETING UNITED NATIONS SECURITY COUNCIL RESOLUTIONS* 6 (2012) (“[W]e may look to any customs or practice arising out of previous resolutions (such as phrases or terms that, over time, have come to have a particular recognised meaning).”).

²⁴ See, for example, Wright, *supra* note 9.

proposition about usage, it can be tested by examining how bodies calling for territorial withdrawal provisions actually frame their demands. In this grammatical approach, post-1967 resolutions are also relevant, as the English language has not changed substantially in this time.

III. EVIDENCE FROM PRIOR AND SUBSEQUENT SECURITY COUNCIL RESOLUTION WITHDRAWAL PROVISIONS

Territorial withdrawal demands occur in at least eighteen other Security Council resolutions, ranging from the first days of the U.N. to the present, and in a variety of geopolitical contexts. Among all the resolutions, there are certain common patterns of language and phrasing. However, Resolution 242's phrase "withdrawal . . . from territories" is entirely unique in Security Council practice. Instead, resolutions before and after demand total withdrawal either by using the definite article or by explicitly referring to the antebellum status quo (thus clearly defining a complete withdrawal). Thus resolutions that demand full territorial withdrawal say so unambiguously, unlike Resolution 242. Indeed, some of the other resolutions resemble the proposed Soviet draft for Resolution 242, which specified a return to the antebellum lines.²⁵ Moreover, several resolutions use comprehensive modifiers like "all" or "whole" to describe the extent of the territorial withdrawal. Those modifiers were explicitly rejected in the negotiations over the drafting of Resolution 242.²⁶ Similarly, General Assembly resolutions calling for territorial withdrawal in other contexts clearly specify the extent of the withdrawal.²⁷

The most probative sources for interpreting Resolution 242 are the Security Council's pre-1967 resolutions, as the meaning of legal texts is fixed at the time of their adoption. By using unambiguous wording, the five withdrawal resolutions adopted before 1967 reveal obvious differences from the hazier language of Resolution 242.²⁸ While these differences may not conclusively

²⁵ See U.N. SCOR, 22d Sess., 1381st mtg., ¶ 7, U.N. Doc. S/PV.1381 (Nov. 20, 1967) ("The parties to the conflict should immediately withdraw their forces to the positions they held before 5 June 1967 in accordance with the principle that the seizure of territories as a result of war is inadmissible."); see also Ruth Lapidoth, *Security Council Resolution 242: An Analysis of its Main Provisions*, JERUSALEM CTR. FOR PUB. AFF. 13, 14 (June 4, 2007), <http://jcpa.org/text/resolution242-lapidoth.pdf> (noting that the Soviet draft was not voted on).

²⁶ See Lapidoth, *supra* note 25, at 19.

²⁷ See, for example, G.A. Res. 62/243, ¶ 2, U.N. Doc. A/RES/62/243 (Mar. 14, 2008) (calling for "immediate, complete and unconditional withdrawal of all Armenian forces from *all the occupied territories*" in Azerbaijan) (emphasis added).

²⁸ This collection of withdrawal provisions was compiled by searching an electronic database of Security Council resolutions for the term "withdrawal," as well as examining all resolutions related to military incursions. I excluded repetitive and iterative withdrawal resolutions using the same

prove the significance of the missing “the,” they unequivocally demonstrate that Resolution 242’s language does not “naturally” mean total withdrawal, especially when considered in the context of Security Council practice. The past resolutions are particularly important because Security Council resolutions can have their own linguistic habits and conventions,²⁹ and thus departing from an established pattern may suggest a different meaning.

An examination of the relevant provisions highlights the uniqueness of 242’s missing article. The bold emphasis has been added to highlight phrases that connote a complete withdrawal, while italicization reflects the style of the resolutions themselves.

A. Pre-1967 Territorial Withdrawal Provisions

1. SC Res. 3 (1946): Calls for “the withdrawal of all USSR troops from **the whole** of Iran”³⁰
2. SC Res. 61 (1948): “*Calls upon* the interested Governments, without prejudice to their rights . . . with regard to a peaceful adjustment of the future situation of Palestine . . . to withdraw those of their forces which have advanced beyond **the positions held on 14 October**”³¹
3. SC Res. 82 (1950): “*Calls upon* the authorities in North Korea to withdraw forthwith their armed forces **to the 38th parallel**”³²
4. SC Res. 143 (1960): “*Calls upon* the Government of Belgium to withdraw its troops from **the** territory of the Republic of Congo”³³
5. SC Res. 210 (1965): “*Calls upon* the parties [India & Pakistan] to . . . promptly withdraw **all** armed personnel to the **positions held by them before 5 August 1965**”³⁴

Not all of the resolutions require withdrawal to pre-war lines. In particular, Resolution 61, which concerns a situation most analogous to that of Resolution 242, did not require a withdrawal to the status quo ante. Responding to the 1948-49 Israeli-Arab War (Israel’s War of Independence), the Council required parties to return to “positions held on 14 October.” However, interstate hostilities had begun immediately upon Israel’s creation in *May 1948* (though

language in successive versions dealing with the same situation. Some other withdrawal resolutions may not have been successfully identified by this methodology.

²⁹ See, for example, Wood, *supra* note 20, at 82 (citing the practice of using the phrase “acting under Chapter VII” in relevant resolutions, while noting that this and other “drafting practices” are not always well known or consistently applied).

³⁰ S.C. Res. 3, U.N. SCOR, 1st Year, U.N. Doc. S/INF/2/Rev.1(I), at 2–3 (Apr. 4, 1946).

³¹ S.C. Res. 61, U.N. SCOR, 3d Year, U.N. Doc. S/INF/2/Rev.1(II), at 28 (Nov. 4, 1948).

³² S.C. Res. 82, U.N. SCOR, 5th Year, U.N. Doc. S/INF/4/Rev.1, at 4 (June 25, 1950).

³³ S.C. Res. 143, U.N. SCOR, 15th Year, U.N. Doc. S/INF/15/Rev.1, at 5 (July 14, 1960).

³⁴ S.C. Res. 210, U.N. SCOR, 20th Year, U.N. Doc. S/INF/20/Rev.1, at 14 (Sept. 6, 1965).

combat between Jewish and Arab units had begun the prior year), with two truces between then and November,³⁵ when the withdrawal resolution was adopted. In the next five months of fighting, Arab forces had taken control of significant portions of Palestine. The Council's withdrawal provision would have allowed them to keep control of most of these territories, including the West Bank, Gaza, and the Negev.³⁶

B. Post-1967 Territorial Withdrawal Resolutions

As discussed in Section II, resolutions adopted after Resolution 242 have less evidentiary value. Subsequent resolutions may have been colored by its unique semantic dispute, though what the effect of this bias would be is not clear. The subsequent resolutions cannot be ignored because of their quantity and consistency. Again, none adopts the general "territories" formulation. Instead, they require withdrawal either from "the" territory or to specified antebellum lines.

1. SC Res. 264 (1969): Calls on South Africa to "withdraw immediately its administration from **the** Territory [of Southwest Africa]"³⁷
2. SC Res. 353 (1974): "*Requests* the withdrawal without delay from **the** Republic of Cyprus of foreign [Turkish] military personnel present"³⁸
3. SC Res. 380 (1975): Calls on Morocco to "immediately [] withdraw from **the Territory** of Western Sahara"³⁹
4. SC Res. 384 (1975): Calls on Indonesia to "withdraw without delay **all** its forces from **the** Territory [East Timor]"⁴⁰
5. SC Res. 425 (1978): Calls on Israel to "withdraw forthwith its forces from **all** Lebanese territory"⁴¹
6. SC Res. 466 (1980): "*Demands* that South Africa withdraw forthwith **all** its military forces from **the** territory of the Republic of Zambia"⁴²
7. SC Res. 502 (1982): "*Demands* an immediate withdrawal of **all** Argentine forces from the Falkland Islands (Islas Malvinas)"⁴³

³⁵ See, for example, U.N. S.C. Res. 50 & 54 (dealing with truce of June-July 1948).

³⁶ See GILBERT, *supra* note 11, at 45-46 (10th ed. 2012).

³⁷ S.C. Res. 264, U.N. SCOR, 24th Year, U.N. Doc. S/INF/24/Rev.1, at 1 (Mar. 20, 1969).

³⁸ S.C. Res. 353, U.N. SCOR, 29th Year, U.N. Doc. S/INF/30, at 7 (July 20, 1974).

³⁹ S.C. Res. 380, U.N. SCOR, 30th Year, U.N. Doc. S/INF/31, at 9 (Nov. 6, 1975).

⁴⁰ S.C. Res. 384, U.N. SCOR, 30th Year, U.N. Doc. S/INF/31, at 10 (Dec. 22, 1975).

⁴¹ S.C. Res. 425, U.N. SCOR, 33rd Year, U.N. Doc. S/INF/34, at 5 (Mar. 19, 1978).

⁴² S.C. Res. 466, U.N. SCOR, 35th Year, U.N. Doc. S/INF/36, at 17 (Apr. 11, 1980).

⁴³ S.C. Res. 502, U.N. SCOR, 37th Year, U.N. Doc. S/INF/38, at 15 (Apr. 3, 1982).

8. SC Res. 546 (1984): “*Demands* that South Africa . . . unconditionally withdraw forthwith **all** its military forces occupying Angolan territory”⁴⁴
9. SC Res. 660 (1990): “*Demands* that Iraq withdraw immediately . . . **all** its forces **to positions in which they were located** on 1 August 1990” (before the invasion of Kuwait)⁴⁵
10. SC Res. 1304 (2000): “*Demands* . . . [t]hat Uganda and Rwanda, which have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo, withdraw **all** their forces from **the territory** of the Democratic Republic of the Congo without further delay”⁴⁶
11. SC Res. 1559 (2004): “*Calls upon all* remaining foreign [Syrian] forces to withdraw from Lebanon”⁴⁷
12. SC Res. 1862 (2009): “*Demands* that Eritrea . . . [w]ithdraw its forces and all their equipment to the positions of **the status quo ante**”⁴⁸
13. SC Res. 2046 (2012): Decides that Sudan and South Sudan must “[u]nconditionally withdraw **all** of their armed forces to **their side of the border**, in accordance with previously adopted agreements”⁴⁹

It is not surprising that most Security Council withdrawal resolutions postdate Resolution 242; many more resolutions have been passed since 1967 than before. But the “the” dispute broke out almost immediately after the passage of Resolution 242,⁵⁰ and it remains a major point of contention. That is, the Security Council has known about the problem of the missing “the” since 1967. If a missing “the” means nothing—if the words mean the same with or without a “the” before “territories”—one would expect to see at least one other withdrawal resolution using the same language as Resolution 242.

The consistency of subsequent practice is particularly notable in light of the politics of the situation. Many nations claim that Resolution 242 requires a complete and total withdrawal.⁵¹ One might expect that these nations would, going forward, purposefully omit a “the” before the geographic term in any resolution contemplating complete withdrawal—if only to drive home the point about the meaning of Resolution 242. That they have repeatedly not reverted to Resolution 242’s formulation suggests its language is simply not what one would

⁴⁴ S.C. Res. 546, U.N. SCOR, 39th Year, U.N. Doc. S/INF/40, at 1 (Jan. 6, 1984).

⁴⁵ S.C. Res. 660, U.N. SCOR, 45th Year, U.N. Doc. S/INF/46, at 19 (Aug. 2, 1990).

⁴⁶ S.C. Res. 1304, U.N. SCOR, 55th Year, U.N. Doc. S/INF/56, at 62 (June 16, 2000).

⁴⁷ S.C. Res. 1559, U.N. SCOR, U.N. Doc. S/INF/60, at 34 (Sept. 2, 2004).

⁴⁸ S.C. Res. 1862, U.N. SCOR, U.N. Doc. S/INF/64, at 288 (Jan. 14, 2009).

⁴⁹ S.C. Res. 2046, U.N. SCOR, U.N. Doc. S/INF/67, at 223 (May 2, 2012).

⁵⁰ See Shabtai Rosenne, *Directions for a Middle East Settlement—Some Underlying Legal Problems*, 33 LAW & CONTEMP. PROBS. 44, 60–61 (1968); see also Wright, *supra* note 9, at 275–76.

⁵¹ See Lapidoth, *supra* note 25, at 25 n.23.

use to require a complete withdrawal, which was the goal sought in all the subsequent resolutions examined here.

One might object that it was the interpretive trouble caused by Resolution 242's alleged ambiguity that prevented the use of the same language in subsequent resolutions regarding other situations. But Resolution 242 has been politically more important than any other resolution. Moreover, in the years after its passage, the notion that Resolution 242 is at least unclear has not been admitted by most states. So if states maintain that there is no doubt that "territories" means "all the territories," one would expect them to have no compunction in using the terms at least interchangeably. Indeed, given the U.N.'s extraordinary interest in the Israeli-Palestinian issue, one might think they would risk confusion elsewhere to clarify that Resolution 242 required complete withdrawal. In any event, the risk of confusion about the scope of withdrawal with other resolutions elsewhere would be negligible, as the other situations lack the drafting history and other particular circumstances of Resolution 242.

One might also object that Israel's situation in 1967 was somehow unique, and thus the language is different on that account. One of the more coherent distinctions is that Resolution 242 used "territories" because Israel took several noncontiguous territories from several different states. This does explain the plural territories, but it is not clear why that eliminates a need for a definite article. Moreover, resolutions related to other situations involving noncontiguous territories have used a "the," such as Resolution 380, which concerned Indonesia's invasion of East Timor.⁵²

Another notable difference between Resolution 242 and almost all subsequent withdrawal resolutions is its lack of an immediacy provision. This accords with the interpretation that the resolution calls for a negotiated solution, which would necessarily require additional time to conclude. If the resolution had called for an "immediate withdrawal of Israel . . . from territories," it would be harder to square with the partial withdrawal interpretation or with an endorsement of negotiated boundaries as opposed to defaulting to Armistice Lines.⁵³

IV. "INADMISSIBILITY OF THE ACQUISITION OF TERRITORY"

Some commentators argue that the preamble's reference to "the inadmissibility of the acquisition of territory by war" helps to contextualize the

⁵² See S.C. Res. 380, *supra* note 39.

⁵³ Security Council Resolution 338, passed in the wake of the Yom Kippur War, added an immediacy requirement to Resolution 242. See S.C. Res. 338, *supra* note 3, ¶ 2 (calling on "the parties concerned to start immediately . . . the implementation of Security Council resolution 242").

withdrawal provision, supporting the reading that a full withdrawal is required.⁵⁴ On its face, the argument has an obvious internal contradiction. It would make little sense to invoke this principle to require Israel to return the West Bank to Jordan and Gaza to Egypt, both of whom acquired the respective territories in what was then a relatively recent war of aggression against Israel. (This objection would not apply to the Golan Heights and Sinai Peninsula, which had been Syrian and Egyptian sovereign territory, respectively, since before Israel's independence.) Given that both Israel and the prior occupants acquired the Gaza and West Bank by force, the "inadmissibility" clause could be understood to require a negotiation of final borders between the belligerents, rather than allowing either side's (changing) fortunes of war to determine them.⁵⁵ In any case, it is generally agreed that while resolutions, like other legal texts, should be read as a whole, operative provisions control preambulatory ones, not vice versa.⁵⁶ In this regard, it is notable that in the Soviet draft, the analogous language appeared in the main body of the resolution.⁵⁷

The Security Council did not invent the principle of non-acquisition of territory by war to which it referred in the preamble. Rather, it invoked what had by then become a customary international law norm.⁵⁸ At least since the adoption of the U.N. Charter, international law forbade aggression as a means of statecraft, and thus generally banned offensive war.⁵⁹ Yet as will be seen, the customary norm had significant caveats and exceptions, relating to the legality of the underlying use of force, and the status of the territory in question. Therefore, the preamble should be understood in relation to the limits of the international norm.

It is important to distinguish the argument made here from a similar one. In the wake of the Six-Day War, several prominent legal scholars argued that because Israel's use of force was defensive, it did not fall under the prohibition of conquest.⁶⁰ Their arguments were based mostly on inference: if the

⁵⁴ See, for example, Wright, *supra* note 9, at 270–71.

⁵⁵ See S.C. Res. 242, *supra* note 1, ¶ 8. This reading would make more sense of the rest of the clause: "the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security." *Id.*

⁵⁶ See JOHN QUIGLEY, *THE SIX-DAY WAR AND ISRAELI SELF-DEFENSE: QUESTIONING THE LEGAL BASIS FOR PREVENTIVE WAR* 111 (2013) (noting that operative provisions "car[r]y more weight" than preambulatory ones); Lapidoth, *supra* note 25, at 17.

⁵⁷ See U.N. SCOR, 22d Sess., 1381st mtg, *supra* note 25, ¶ 7.

⁵⁸ An early draft submitted by a non-aligned state explicitly related the "inadmissibility" provision to the U.N. Charter. See Lapidoth, *supra* note 25, at 17.

⁵⁹ See MALCOLM N. SHAW, *INTERNATIONAL LAW* 362 (7th ed. 2014).

⁶⁰ See, for example, Stephen M. Schwebel, Editorial Comment, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 346–47 (1970); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea*

prohibition of conquest is a corollary of the illegality of war in the U.N. Charter, in circumstances where that rule does not apply, its corollary also drops out.⁶¹ In the decades since the 1967 war, most scholars have rejected the contention that international law tolerates defensive conquest.⁶² They also offer little evidence for this position, except for enumerating the relative number of scholars on either side of the debate.

It may well be that a categorical norm against territorial acquisition as a result of war has crystalized since 1967. But the real question for interpreting Resolution 242 is how the law stood in 1967.⁶³ This is particularly crucial because the Six-Day War may be one of the only examples of colorable defensive conquest since World War II. Thus, after 1967, views on the principle became inextricable from views on the Arab-Israel conflict. Before Israel's unexpected victories in 1967, that was not the case.

There is evidence—thus far unexplored in relation to Resolution 242—that the U.N. Charter-based principle against conquest, at least as understood within the U.N. before 1967, did not prohibit the acquisition of territory in a non-aggressive war. Key international legal discussions shortly after the birth of the U.N. demonstrate that the new prohibition on conquest had several internal limits. Thus, Resolution 242's preamble's reference to the general rule against conquest would presumably incorporate this implicit limitation.

The present inquiry is not whether the right of self-defense authorizes conquest or even whether it did so in 1967. Rather, the inquiry focuses only on

and Samaria, 3 ISR. L. REV. 279, 294 & n.60 (1968); ELIHU LAUTERPACHT, ANGLO-ISRAELI ASS'N, JERUSALEM AND THE HOLY PLACES 51–53 (1968).

⁶¹ Schwebel cites one important piece of state practice: after the Korean War, the Republic of Korea retained, with U.N. approval, significant territory north of the antebellum border (the 38th parallel); there was no suggestion that the parties should return to the 38th parallel, and indeed U.N. forces sought to push the North back much farther. *See* Schwebel, *supra* note 60, at 347. To be sure, this might not demonstrate an acceptance of defensive conquest as much as conquest per se, as the Democratic People's Republic of Korea was left with territory south of the 38th parallel. Schwebel might have cited the Indian conquest of Goa and other Portuguese territories in 1961 as examples where the perceived lawfulness of the underlying resort to force—in this case, arising not from self-defense but anti-colonialism—allowed for clear and undisputed title established by conquest.

⁶² *See* ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY 107–08 & n.30 (2006) (collecting sources).

⁶³ Many scholars ignore this basic point about inter-temporal law. For example, Antonio Cassese cites a 1970 General Assembly resolution on “friendly relations between states” for evidence of what the law was in 1967, but ignores pre-1967 resolutions and discussion in the General Assembly. *See* ANTONIO CASSESE, THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS 280 (2008). Oddly, Cassese also misrepresents the weight of authority on the question pre-1967, as he cites only Robert Jennings and suggests his views were generally accepted, something Jennings himself disclaims. *See id.* at 279–80.

the meaning of the preambulatory “inadmissibility” clause, and its bearing on the rest of the resolution. Therefore, this section develops evidence about how the anti-conquest norm was *understood* at the time. The inadmissibility of territorial acquisitions was a concept that had developed in the preceding decades, and at the time was widely understood not to be absolute. Many of the contours of the prohibition remained unclear. The preamble of Resolution 242 referred precisely to this set of ideas, with all their unsettledness. Indeed, it was the vagueness of the rule that could make it acceptable to all parties. To the extent the principle did not apply to non-sovereign but rather “disputed” territory,⁶⁴ it could arguably countenance Egyptian, Jordanian, and Israeli acquisition of parts of the territory of Mandatory Palestine.⁶⁵

A. The Work of the International Law Commission

The records of the International Law Commission (ILC) from the post-war years reveals that its distinguished members, tasked with more specifically articulating the principles of the U.N. Charter,⁶⁶ discussed these very issues. What clearly emerged is that the prohibition of conquest was far from absolute. Many of the leading jurists of the post-World War II era, including Manley Hudson and James Brierly, thought that the lawfulness of the resort to force determined the permissibility of subsequent conquest.⁶⁷ The legality of the belligerent’s cause directly bore on the ability to take territory, as a series of debates and discussions in the ILC makes clear.

The ILC’s mission of setting out the basic principles of the U.N. era resulted in the drafting of two codes of international law—a *Draft Declaration on the Rights and Duties of States* (1949)⁶⁸ and a *Draft Code of Offences against the Peace and Security of Mankind* (1954).⁶⁹ The latter was a direct consequence of the historic

⁶⁴ See Georg Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AM. J. INT’L. L. 308, 314 (1957) (arguing that international law restricts only the taking of the sovereign territory of one state by another state, and that conquest is not relevant to non-sovereign territory).

⁶⁵ See 1 ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE POLITICAL ORGANS OF THE UNITED NATIONS* 277, 317 (1962) (explaining that the U.N. did not treat Arab “invasions” of Israel/Palestine in 1948–49 as involving an issue of Art. 2(4) of the Charter, because it was a “territory whose status was in dispute” and “objectively and generally in doubt”).

⁶⁶ The ILC is a body of international law experts, established by the General Assembly in 1947 to develop and codify public international law. See *Introduction*, INT’L. L. COMM’N, <http://legal.un.org/ilc/ilcintro.htm>.

⁶⁷ See *Preparation of a Draft Code of Offences against the Peace and Security of Mankind*, [1950] I Y.B. INT’L L. COMM’N 136, U.N. Doc. A/CN.4/SER.A/1950 [hereinafter ILC Draft Code Preparation 1950].

⁶⁸ G.A. Res. 375 (IV), U.N. Doc. A/RES/375(IV) (Dec. 6, 1949).

⁶⁹ *Draft Code of Offences against the Peace and Security of Mankind*, [1954] II Y.B. INT’L L. COMM’N 151, U.N. Doc. A/CN.4/SER.A/1954/Add.1 [hereinafter 1954 Draft Code].

General Assembly Resolution 177, which articulated and endorsed the legal principles behind the Nuremberg Charter and subsequent military tribunal judgments and called on the ILC to “[f]ormulate the principles of international law recognized in” the Nuremberg processes.⁷⁰

The drafting of both codes led to discussions about the legality of annexation and conquest.⁷¹ The ILC commissioners recognized that the U.N. Charter created a new prohibition on conquest, as a result of its general ban on the use of force in Article 2(4).⁷² However, they also recognized that international law did not make all acquisition of territory by force illegal.⁷³ Hudson, for example, doubted that there was a blanket ban on such acquisitions because “[a]nnexations varied very greatly between one case and another.”⁷⁴ Several other delegates agreed that there was no total ban on forcible acquisition of territory.⁷⁵ In particular, the Dutch jurist J.P.A. François worried that the rule could apply to the actions of Holland, Belgium, and France, which conducted post-World War II “frontier adjustments without consulting the populations.”⁷⁶ His colleagues reassured him that those were not the kind of acts encompassed by the prohibition on annexation.⁷⁷ Thus, the leading jurists of the time did not think all forcible territorial change was illegal, but only those acquisitions where the underlying use of force—the recourse to war itself—was illegal.

The ILC reached a consensus that only conquest resulting from “aggression”—that is, the illegal use of force—or through an “offence against the peace and security of mankind” would be barred.⁷⁸ In other words, the legality of the underlying use of force was key to the legality of any territorial changes resulting from it. Thus, where resort to force was not offensive but defensive, it would not be prohibited.⁷⁹ The Draft’s phrase “*by means of acts*

⁷⁰ *Id.* at 149.

⁷¹ The commission noted the similarity of the questions involved in the two different Drafts. *See* 1 Y.B. Int’l L. Comm’n 137, ¶ 80, U.N. Doc. A/CN.4/SER.A/1950 [hereinafter 1950 Yearbook Int’l L. Comm’n].

⁷² U.N. Charter art. 2, ¶ 4 (“All Members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”)

⁷³ *See* ILC Draft Code Preparation 1950, *supra* note 67, at 136.

⁷⁴ *Id.*

⁷⁵ *See id.* at 136–38.

⁷⁶ *Id.* at 137.

⁷⁷ *See id.*

⁷⁸ *Id.* at 138. *See also* 1950 Yearbook Int’l L. Comm’n, *supra* note 71, at 136 (suggestion of Mr. Sandstrom to adopt language barring “annexation of territories by the threat or use of *force for an aggressive purpose*”) (emphasis added).

⁷⁹ *See* ILC Draft Code Preparation 1950, *supra* note 67, at 148, 257.

contrary to international law”⁸⁰ encapsulates the Commission’s view that only when the use of force itself violated international law would the prohibition apply.⁸¹

Moreover, the discussions repeatedly emphasized that only conquest of the “territory of another State” would be prohibited.⁸² Territories that were not under the sovereignty of any state because they were disputed, under an international mandate, or ownerless (*terra nullius*) would not fall within the prohibition.⁸³ This limitation was not contained in the first draft of the provision, but after discussion, the provision was revised to clearly limit the situations to sovereign territory.⁸⁴ Thus, the final draft unanimously adopted by the ILC banned “[t]he annexation by the authorities of a State of territory *belonging to* another State, by means of acts contrary to international law.”⁸⁵ This limitation on the Charter’s conquest ban to sovereign state territory anticipates, but is analytically distinct from, Israel’s post-1967 position that the Fourth

⁸⁰ ILC Draft Code Preparation 1954, *supra* note 69, at 151 (emphasis added).

⁸¹ The penultimate draft outlawed “the annexation, contrary to international law, of territory belonging to another State, or of territory under an international regime.” *Report of the International Law Commission to the General Assembly*, 6 U.N. GAOR Supp. No. 9, at 8, U.N. Doc. A/1858, reprinted in [1951] II Y.B. Int’l L. Comm’n 136, U.N. Doc. A/CN.4/SER.A/1951/Add.1. The major changes from this to the final draft are the limitation to sovereign territory and the clarification that acts resulting in the conquest must themselves be illegal for the resulting acquisition to be illegal.

⁸² *Id.* at 34-35, 58, 60, 65–68, 135.

⁸³ See 1950 Yearbook Int’l L. Comm’n, *supra* note 71, at 119 (view of Mr. el-Khoury that state practice shows that the seizure of territory belonging “by right to the State of which the invader was a national” does not amount to an international crime).

⁸⁴ Compare ILC Draft Code Preparation 1950, *supra* note 67, at 165 (“annexation of the territory of a State”), with 1954 Draft Code, *supra* note 69, at 151 (“annexation by the authorities of a State of territory belonging to another State”).

⁸⁵ 1954 Draft Code, *supra* note 69, at 151 (emphasis added). For a contemporaneous example of an annexation of territory under an international regime that was not met with any international condemnation, consider Yugoslavia’s annexation in October 1954 of much of the Free Territory of Trieste, which it had occupied at the end of World War II. Trieste was designated by the Security Council as an independent quasi-state under international administration. See S.C. Res. 16 (Jan. 10, 1947). Yugoslavia’s takeover of the territory, however, took place pursuant to an agreement with the U.K. and U.S., which partially administered the territory, and met with no international condemnation. See Huey Louis Kostanick, *The Geopolitics of the Baltics*, in CHARLES JELAVICH & BARBARA JELAVICH, *THE BALKANS IN TRANSITION: ESSAYS ON THE DEVELOPMENT OF BALKAN LIFE AND POLITICS SINCE THE EIGHTEENTH CENTURY* 22–23 (1963); see also CARSTEN STAHN, *THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND* 188–91 (2008) (describing the establishment and governance of the Free Territory).

Geneva Convention's provisions on occupation do not apply to the West Bank and Gaza.⁸⁶

B. The Relevance of Post-War Border Changes

The same consensus emerged during the drafting of the Declaration on the Rights and Duties of States.⁸⁷ From the first draft prepared by Panama, all versions demanded non-recognition of territorial acquisition through the “illegal use of force.”⁸⁸ In a meeting of ILC commissioners in May 1949, François spotlighted the large-scale revision of the borders of Axis nations by the victorious Allies, in particular the then-pending annexation of much of Germany by Poland.⁸⁹ The ILC's allowance of militarized territorial change in narrow circumstances reflected current state practice in the years immediately after the adoption of the U.N. Charter. During the Commission's discussions, the victors of World War II redrew sovereign borders in their favor and that of the Allies.⁹⁰ For example, with the approval of the Allied governments, the Netherlands on April 23, 1949 marched into and annexed 69 square kilometers of Germany, then inhabited by 10,000 people. The Dutch justified it as a self-help reparation for German war spoils.⁹¹ Italy was forced to hand over several towns and border areas to France in the 1947 Treaty of Peace with Italy, signed in Paris.⁹² More significantly, France partitioned the Saar region from occupied Germany,

⁸⁶ See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 206–07 (2d ed. 2012). Israel's position on the scope of occupation is based on the language of Common Article 2 of the Geneva Conventions of 1949 and is thus distinct from the ILC's views discussed here, which were based on the U.N. Charter and state practice.

⁸⁷ See *Summary Records of the First Session*, [1949] I Y.B. Int'l L. Comm'n 143–44, U.N. Doc. A/CN.4/SER.A/1949 [hereinafter *Summary Records of the First Session* 1949].

⁸⁸ *Report of the International Law Commission to the General Assembly*, [1949] I Y.B. Int'l L. Comm'n 289, U.N. Doc. A/CN.4/SER.A/1949 (emphasis added); see G.A. Res. 375 (IV), *supra* note 68.

⁸⁹ See *Summary Records of the First Session* 1949, *supra* note 87, at 143.

⁹⁰ The Allies would base their rights in West Berlin on conquest (the city which was never incorporated into the Federal Republic of Germany, and instead remained under direct Tripartite rule). See Quincy Wright, *Some Legal Aspects of the Berlin Crisis*, 55 AM. J. INT'L L. 959, 961–61, n.9, n.11 (1961) (criticizing the Western position on Berlin as in tension with principles of territorial non-acquisition).

⁹¹ The Dutch had originally planned to annex a much larger chunk of Germany but were met with opposition by the Allies. In 1963, Germany purchased most of the annexed territory back from Holland. See BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEPT OF STATE, INTERNATIONAL BOUNDARY STUDY NO. 31, GERMANY-NETHERLANDS BOUNDARY 4–5 (1964), available at <http://www.law.fsu.edu/library/collection/LimitsinSeas/IBS031.pdf>.

⁹² Other parts of Italy were apportioned among Greece and Yugoslavia. For a complete list of territories ceded to France, Yugoslavia, and Greece, see Treaty of Peace with Italy, arts. 6–9, Feb. 10, 1947, 61 Stat. 1245, 1374–78.

governing it as a “protectorate” in customs union with France until 1957.⁹³ The Soviet Union and Poland annexed large sections of Germany and presided over similar adjustments in the territorial borders of their central European allies.

The commission members viewed these annexations as evidence of, rather than violations of, international law.⁹⁴ Thus, they concluded that under some circumstances, international law still permits “territorial acquisitions made through force.” The post-war peace treaties carving up the Axis powers had not yet been signed, and the Commission was conscious that the rules it made would govern those deals—and should not be seen as repudiating them.⁹⁵ The Panamanian delegate, Ricardo Alfaro, who strongly favored banning conquest, nonetheless agreed that the post-war territorial modifications were legal. He distinguished between “conquest” and “reparations,” suggesting again that punishing an aggressor would not fall within the prohibition.⁹⁶ Certainly, he argued, the “restitution of territories acquired and held by force or . . . in violation of international law” by the defeated power would not count as prohibited conquest on the part of the victor.⁹⁷ The Commission amended its original language to clarify that territorial conquest would not be illegal when the underlying use of force did not violate the U.N. Charter,⁹⁸ which led one member to dissent on the ground that the Commission had decided that “justified” territorial acquisitions were legal.⁹⁹

While the Draft Code was ultimately never fully adopted as a binding treaty by states, its contents and drafting history reveal the thinking of the most eminent international lawyers on the relevant questions. It is clear that as of the early 1950s, there was a principle against the acquisition of territory through force—the same principle referred to in the Resolution 242 preamble—and that the principle had several limits, most saliently, that it only applied to uses of

⁹³ See generally JACQUES FREYMOND, *THE SAAR CONFLICT 1945–1955* (1960); STEFAN WOLFF, *DISPUTED TERRITORIES: THE TRANSNATIONAL DYNAMICS OF ETHNIC CONFLICT SETTLEMENT* 87–97 (2003).

⁹⁴ In this they were not alone. See WESLEY L. GOULD, *AN INTRODUCTION TO INTERNATIONAL LAW* 354 (1957) (“[A]t the end of both World Wars the transfer of territory was made possible by conquest, and so it would seem that any prohibition against acquiring or transferring title by conquest applies only to aggressors.”).

⁹⁵ See *Summary Records of the First Session 1949*, *supra* note 87, at 143.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *Draft Declaration on the Rights and Duties of States*, art. 11, [1949] I Y.B. Int’l L. Comm’n 287, U.N. Doc. A/CN.4/SER.A/1949.

⁹⁹ See *Summary Records of the First Session 1949*, *supra* note 89, at 143–44. Roberto Cordova of Mexico dissented on the ground that the Commission was seeking to vindicate the post-war peace treaties, a view echoed by A.E.F. Sandstrom of Sweden.

force that were unlawful *ab initio* and directed against the sovereign territory of other states. These limitations were broadly agreed upon by jurists from entirely different geopolitical backgrounds and were based in part on the post-war practice of the victorious powers, which continued to take or hold territory well into the 1950s.

C. The Views of Scholars Pre-1967

The limitations on the non-acquisition norm expressed in the ILC drafts were also reflected in the writings of the leading publicists of the time. In the 1950s and 60s, many scholars noted that the precise scope of a prohibition on territorial acquisition as a result of war remained unclear.¹⁰⁰ Several major authorities, including Hersch Lauterpacht,¹⁰¹ maintained lawful force could lead to lawful territorial change; Robert Jennings disagreed.¹⁰² Yet Jennings conceded that contrary views were widely held, and based his position entirely on policy considerations, with no citation of practice or opinion juris.¹⁰³ Even Jennings was not entirely clear about whether the legality of the use of force was

¹⁰⁰ OSCAR SVARLIEN, AN INTRODUCTION TO THE LAW OF NATIONS 178 (1955) ("The legality, under any and all circumstances, of the acquisition of territory through conquest and subjugation, is in view of recent legal developments, open to question."); FLORENTINO P. FELICIANO, LEGAL REGULATION OF TRANSNATIONAL COERCION: STUDIES IN THE LAW OF WAR IV/3 (1954) (noting that there is "distinguished support" for the view that acquisition was only barred as a result of illegal war, but arguing for a different rule in which the "final disposition of the territory," in cases of lawful war, "should . . . be based on a decision reached by the organized world community"). See also JAMES L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 171-73 (Humphrey Waldock ed., 6th ed. 1963) ("The truth is that international law can no more refuse to recognize that a finally successful conquest does change the title to territory than municipal law can a change of regime brought about by a successful revolution."); HANS Kelsen, PRINCIPLES OF INTERNATIONAL LAW 216 (1952) (arguing that illegality of aggression does spill over to resulting conquests because the principle that rights cannot accrue from illegal acts does not apply in international law). See generally NORMAN HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS (1945).

¹⁰¹ See generally H. Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206 (1953).

¹⁰² Compare ROBERT YEWDALE JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 55-56 (1963), with L. OPPENHEIM, INTERNATIONAL LAW 574-75 (H. Lauterpacht ed., 8th ed. 1955) ("[T]itle by conquest remains a valid title in those cases in which the conquering State is not bound by the Charter of the United Nations . . . or when although when so bound, the resort to war on its part is not, in the particular case, unlawful."); GOULD, *supra* note 94, (noting possibility of title based on "defensive" conquest). See also Schwarzenberger, *supra* note 64, at 309 (discussing the U.N. Charter's "outlawry of titles based on war other than war in self-defense and, according to some writers, even on the latter").

¹⁰³ See JENNINGS, *supra* note 102, at 56; see also C.A. Weston, *Reviews*, 27 MODERN L. REV. 113, 114 (1964) (reviewing JENNINGS, *supra* note 102) (calling Jennings's ideas about conquest "propos[al]s," and noting that Jennings makes considerable allowance for forcible territorial change in the form of his self-help exception).

irrelevant to the legality of a resultant acquisition of territory. After discussing self-defense, Jennings distinguished the situation of “forcible self-help,” where a state uses force to take territory to which it has a better claim to title than the prior possessor. The mere use of force to take control of its claimed territory in no way vitiates its title, which would not be based on conquest but rather on some preexisting circumstances. Jennings conceded that this use of force would not be unlawful because international law does not prohibit one state’s use of force “within its own territory,” even if that territory had been under the consolidated administration of another state.¹⁰⁴ Thus, even for Jennings, the legality of the use of force colors the legality of ensuing territorial changes.

D. Drafting the Declaration on Friendly Relations, 1966–1970

The General Assembly’s 1970 “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations” articulates a strong version of the inadmissibility-of-conquest norm that, if used to interpret Resolution 242’s preamble, would point towards a complete withdrawal.¹⁰⁵ While the Declaration was only made in 1970, the Special Committee that drafted the declaration had been created by the General Assembly in 1963. The Committee was tasked with formulating the specifics of various international principles, including the Charter prohibition on the use of force. Given the 1970 outcome of the Committee, one might wonder at what point its understanding of the anti-acquisition norm emerged. An examination of the records and debates of the Committee shows that, as of 1967, it did not agree on recommending a prohibition on conquest resulting in lawful force or of non-sovereign territory. While proposals to this effect had been made in the 1964–66 period, they had encountered substantial opposition, and no consensus emerged until 1970. Given that the Committee’s task was not merely to codify international law but to work for its “progressive development”—that is, to suggest new rules—this is further evidence that the non-acquisition norm, as it stood in 1967 and would have been generally understood at the U.N, contained salient exceptions that could apply to the situation dealt with in Resolution 242.

¹⁰⁴ JENNINGS, *supra* note 102, at 66.

¹⁰⁵ See G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970):

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. . . . No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

The first report of the Special Committee outlined its debates in its first year.¹⁰⁶ It considered several proposals to prohibit the “use of force in territorial disputes or boundary problems,”¹⁰⁷ but the discussion of this proposal was general and cursory. A related discussion about the principle of non-recognition of situations brought about by the use of force saw significant disagreement about the principle. Several members opposed any “general rule,” noting that territorial change was sometimes legitimate or justified, as when the prevailing party had not “illegally resorted to force.”¹⁰⁸ No consensus was reached on these points.¹⁰⁹

As the Special Committee continued its work in 1966, it discussed a report by its rapporteur, Hans Blix.¹¹⁰ One of the most divisive issues involved proposals to include “international lines of demarcation” in the prohibition on the use of force to change state borders.¹¹¹ Proponents argued that “the maintenance of peace depended on respect” for armistice lines, noting that they were often under U.N. supervision and posed greater risks of conflict than established borders.¹¹² Opponents argued that the sponsors could not seriously “propose that demarcation lines should fall within the concept of territorial inviolability or to sanction under international law demarcation lines that include portion of other States . . . or make . . . armistice lines into final boundaries.”¹¹³ Similar discord arose on the question of non-recognition of such territorial changes, with opponents noting the post-WWII practice of states would make such a rule “disastrous.”¹¹⁴ The legality of the underlying use of force was also mentioned.¹¹⁵

The next report covered discussions at the Commission’s 1967 session, held immediately after the Six Day War and before passage of Resolution 242.¹¹⁶ While brief mention was made of the war,¹¹⁷ the representatives remained

¹⁰⁶ U.N. Doc. A/5746 (Nov. 16, 1964).

¹⁰⁷ *Id.* at 90, ¶¶ 64–65.

¹⁰⁸ *Id.* at 93–94, ¶¶ 91, 93.

¹⁰⁹ *See id.* at ¶ 98.

¹¹⁰ Report of the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, U.N. GAOR, 21st Sess., Agenda Item 87, U.N. Doc. A/6230 (June 27, 1966).

¹¹¹ *Id.* at ¶¶ 92–97.

¹¹² *Id.* at ¶ 95.

¹¹³ *Id.* at ¶ 94.

¹¹⁴ *Id.* at ¶ 101.

¹¹⁵ *See id.* at ¶ 102.

¹¹⁶ Report of the Special Committee, U.N. GAOR, 22d Sess., U.N. Doc. A/6799, 5 (Sept. 26, 1967).

¹¹⁷ *See id.* at ¶ 111.

divided on the same issues as before. Again, “opinions were divided” on whether the prohibition of the acquisition applied across “international lines of demarcation.”¹¹⁸ Some representatives saw such a rule as “improper and dangerous” because it would de facto recognize or perpetuate illegal situations; others objected that such lines were real, and crossing them implicated the same principles as Article 2(4) of the Charter. The Special Committee continued with its discussion of non-recognition of territorial situations brought about by force.¹¹⁹ Again some members thought it limited to situations of the “unlawful use of force,” and in particular, aggression.¹²⁰ The disagreement over these issues continued in the Committee’s 1969 debates.¹²¹ Indeed, despite years of discussion, the Committee had failed to agree more broadly on the general principle concerning the prohibition of the use of force, of which these issues were particular instantiations.

At this point, the General Assembly asked the Committee to complete its work. The territorial change questions remained a subject of debate. The decision to include the provisions found in the Declaration was first made by the drafting committee in early 1970, shortly before the Special Committee approved the draft declaration and submitted it to the General Assembly.

V. CONCLUSION

The wording of Resolution 242’s territorial withdrawal clause is unique among the nineteen territorial withdrawal demands described here. Its lack of a clear mandate for total withdrawal, while not manifest on its face, becomes more evident when compared with similar provisions adopted by the Council both before and after Resolution 242. The singular occurrence of the missing “the” suggests that “withdrawal from territories” is not simply another way of saying all the territories, but a purposeful difference.

To be sure, this is but one piece of evidence to be used in interpretation. It is arguably less important than the drafting history, the French text of Resolution 242, and the other provisions of Resolution 242. But all these factors have been argued extensively both ways for decades, and new evidence can be important to navigating this impasse.

¹¹⁸ *Id.* at ¶¶ 69–73.

¹¹⁹ *See id.* at 17–18, ¶ 75.

¹²⁰ *Id.* at 18, ¶¶ 76–77.

¹²¹ *See* Report of the Special Committee, U.N. GAOR, 24th Sess., U.N. Doc. A/7619 ¶¶ 65–67, 77–81 (1969). In 1969, more nations seemed to favor mentioning “international lines of demarcation” than before. The United Arab Republic, India, and Cameroon put forward a rather unusual suggestion to bar recognition of forcible territorial changes, or even occupation, involving territory “in which mankind has a common interest.” *Id.* at ¶ 80.

Moreover, an exploration of how the norm against territorial acquisition was understood at the time – as reflected in the debates and Draft Codes of the International Law Commission, the writings of leading scholars, and the drafting history of the Friendly Relations Declaration – all show that the norm was not understood to categorically prohibit such changes. While the scope of the norm was uncertain, it was widely understood to allow territorial change involving lawful use of force or non-sovereign territories. While this changed rapidly after 1967, moving towards an absolute prohibition, this is not the norm that the preamble referred to. Rather, it referred to an unsettled but non-absolute norm, which could allow for incomplete withdrawal in the circumstances of the 1967 Arab-Israel War.

Finally, it may be that nothing can conclusively prove what Resolution 242 meant because the resolution was drafted precisely to be ambiguous. This is hardly surprising for a diplomatic, rather than a legal, document—let alone one negotiated among rival superpowers—the purpose of which is to elide disagreements rather than emphasizing them.